Supreme Court, U.S.
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No. 93-163

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

THE CITY OF DEL MAR,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State of California

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Respondent's objection is refuted by the Second Amended Complaint dated November 14, 1988 at Pet. App. L-3-4; and the Lower Court Opinion at App. E-7-20.

2. Respondent's objection is refuted by Fn[3], p 3, Fn[4], p 4 and pp 17 and 18 of the Petition wherein, among other things, the "zoning map" at Pet. App. V-1 is referenced. The island "Spot Zoning" depicted at Pet. App. V-1 is so visually obvious that further expansive argument is unnecessary.

3. Respondent's objection is refuted by the Second Amended Complaint dated November 14, 1988 at Pet. App. L-7-10; and the Civic Association's reconveyance of property *was not* to its members as stated by Respondent here; but was conveyed to Del Mar as Respondent states at p 2 of Resp. Opp. Br. (last sentence).

The "root" of the entire Petition argument is (1) parcel versus (20) lots and "Spot Zoning."

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, James E. Smith, respectfully submits this Reply to Brief in Opposition.

REQUEST FOR JUDICIAL NOTICE

Petitioner hereby requests this Court to take "Judicial Notice" of the Petition for Writ of Certiorari, Case No. 93-359, filed in this Court on September 2, 1993, involving the same parties and court below. This Petition (Case No. 93-359), and other pending litigation was brought to this

Court's attention at pp 5-7 of the Petition filed on August 2, 1993 for this Case No. 93-163.

In addition, a third Petition for Writ of Certiorari, involving the same property and court below, will be filed in late September, 1993 (Appendix now at the printers), concerning the California Supreme Court's denial on August 25, 1993 of the Petition for Review brought to this Court's attention at p 5, 2nd paragraph, under Statement of Other Litigation Pending in the Petition filed on August 2, 1993 for this Case No. 93-163.

Also, the Court of Appeal, Fourth Appellate District, Division One, Case No. D-15917, concerning Petitioner's new residence on lot T, Map No. 1343, on August 18, 1993 rendered its decision sustaining the trial court's decision. Petitioner plans a timely filing on or before September 27, 1993 of a Petition for Review in the California Supreme Court. On p 6, second paragraph, under Statement of Other Litigation Pending, Case No. 93-163 (i.e., this Petition), this pending litigation was brought to this Court's attention.

ARGUMENT

PETITIONER'S RIGHT TO COMPENSATION FOR A TAKING IS UNAFFECTED BY THE MERGED STATE OF THE LOTS AT THE TIME OF PURCHASE

Pursuant to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) the fact that Petitioner purchased the property in its merged state does not affect Petitioner's right to be compensated for a "Taking." Respondent overlooks this Court's holding in *Nollan* supra, that " . . . the

prior owners must be understood to have transferred their full property rights in conveying the lot(s)." *Id.* at 834, Fn[2].

Petitioner's predecessor had every right to possess and dispose of the lots in their subdivided state. In fact the lots were conveyed to Petitioner by deed which described the lots as they were originally subdivided (Pet. App. at Y-1-4).

Respondent similarly overlooks the fact that the merger statute was eventually repealed and the lots were deemed unmerged by operation of law (Pet. App. at R-5). Both factors lend credence to a contention that the statute was an invalid exercise of the state's police power in the first place. See Appendix A Resp. Opp. Br. p 8(a) and/or Pet. App. at B-9-10 wherein the California Attorney General states:

> "The conclusion to the first question, therefore is that parcels did not meet the conditions for merger under section 66424.2 as enacted effective January 1, 1977, if they were then eligible for use or development pursuant to an existing local ordinance." (Calif. 62 Ops. Cal.Atty.Gen. 281 (1979).

All twenty lots were eligible for use or development on January 1, 1977 by virtue of their creation "in compliance with existing subdivision laws and regulations." (62 Ops., supra at Pet. App. at B-10 and/or Appendix A. Resp. Opp. Br. p 6a).

Respondent contends that Petitioner made no "meaningful" application to subdivide the lots and suggests

that somehow this negates the impact of the fact that this statute was a novelty in California. (Resp. Opp. Br. p 8).

Petitioner submits that the City of Del Mar caused the lots to be merged in order to prevent their residential development. Suggesting that Petitioner merely had to re-subdivide the lots in order to develop them only strengthens this "taking" claim. The City, better than anyone, knows the bureaucratic nightmare a property owner must go through to have any development approved. Secondly, if the City is already anti-development then getting that approval is even less likely.

Professor Richard Babcock, the dean of the American land use bar, has called overreaching governmental regulation (in which the regulators demand that which they know they are legally precluded from demanding but which they know their targets cannot afford the time or expense to challenge) "municipal leverage." [Babcock, *Forward to Exactions: A Controversial New Source For Municipal Funds*, 50 Law and Contemp. Prob. 1, 2 (1987)]. Aside from this Court's celebrated response in *Nollan*, supra, in which this Court described such tactics as "extortion," [*Id.*, 837], some condemnatory judicial reactions can be found in *Collins v. City of Bloomington*, 246 N.W.2d 19 at 26 (Minn. 1976), ["grand theft"]; *West Park Ave., Inc. v. Township of Ocean*, 224 A.2d 1 at 4-5 (N.J. 1966), ["municipal lawlessness"]; *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12 at 14 (N.H. 1981), ["extortion"].

Finally, Respondent has neglected to examine the "all use" criterion in light of *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886 (1992). Respondent

contends that Petitioner had not lost all economical viable use of the lots but neglects to shed any illumination upon what uses, in a constitutional sense, there were following the merger. Petitioner submits there were none following the destruction of the lot lines by the merger. However, under any analysis there were fewer uses left than in *Lucas*, supra, since the lots ceased to exist.

Any property owner who challenges this over-reaching police power is subjected to increased governmental interference of private property rights. The request for judicial notice of pending Case No. 93-359 is a perfect example of the erosion of private property rights and the effects of challenging a government out of control.

Case No. 93-359 filed on September 2, 1993 in this Court, involves the same parties and lots H, I and J, Map 1285 and lot U, Map 1343, [(4) of the (20) lots involved herein]. Respondent recorded "Notices of Violation of Illegal Subdivision" on said (4) lots by *"irrationally connecting"* the presumptions at California Civil Code §§ 831 and 1112 to "roadway vacation time" rather than "conveyance time." Case No. 93-359 further illustrates Respondent's use of illegal means to stop residences from being built on these (4) lots; and is in total contravention of Respondent's July 15, 1986 "legal lots" letter at Pet. App. P-1-2. Respondent illustrates that its written word is worthless and that Respondent is above the laws of California and the United States.

Respondent's main activity is enforcing and applying laws without due regard to the lot owner's rights which are tied up within his "bundle of rights." This case as

well as Case No. 93-359 serves to show how far Respondent Del Mar will go to ensure that lots not be developed if that be the wish of the City's operators. Hopefully, something will be done to stop it.

Respectfully submitted,
/s/ James E. Smith
JAMES E. SMITH
Propria Persona

Dated: September 9, 1993